1979

William Andrews v. Lawrence Morris : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAN ANDREWS,

Petitioner-Appellant,

-vs- : Case No. 16168

LAWRENCE MORRIS, As Warden of the Utah State Prison,

Respondent-Appellee

BRIEF OF APPELLANT

Appeal from the dismissal of a Petition for a Writ of Habeas Corpus in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya presiding.

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WILLIAM ANDREWS, :

Petitioner-Appellant, :

-vs- :

LAWRENCE MORRIS, As Warden of the Utah State Prison, :

Respondent-Appellee, :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This case is an appeal from an order of the Third Judicial District Court, Hon. James S. Sawaya, dismissing Appellant's Petition for a Writ of Habeas Corpus, which claimed that Appellant was confined under a sentence of death imposed in violation of the Constitution of the United States.

DISPOSITION IN THE LOWER COURT

The Court below granted Respondent's Motion to Dismiss the Petition for a Writ of Habeas Corpus without argument or a hearing, and denied Petitioner's Motion for a Stay of Execution pending a hearing on his Writ.

RELIEF SOUGHT ON APPEAL

Appellant weeks to have this Court reverse the District Court's order dismissing his Petition for a Writ

of Habeas Corpus without a hearing and to remand the case to the District Court for further proceedings in which Appellant would have the opportunity to present arguments and evidence in support of his constitutional claims, and to grant a stay of execution pending completion of those proceedings.

STATEMENT OF FACTS

On October 2, 1978, the Supreme Court of the United States declined to review this Court's affirmance of the death sentence imposed on Appellant William Andrews. On November 3, 1978, the Second Judicial District Court of Utah entered an order resentencing Appellant to be executed on December 7, 1978.

On November 16, 1978, a Petition for a Writ of Habeas Corpus, and an Application for Stay of Execution pending a hearing on that Petition, was filed on Appellant's behalf in the Third Judicial District Court of Salt Lake County. On November 24, 1978, Respondent filed a Motion to Dismiss that Petition. That motion was not received by counsel for Appellant until November 27, 1978--at the same time Appellant's counsel informed Respondent that Appellant would be filing an amended petition for habeas corpus. On November 28, 1978, that amended petition was filed and served. On November 29, 1978, both parties appeared before the Hon. James S. Sawaya for a hearing on Appellant's motion; at that time Respondent indicated

it had no objection to Appellant's filing of the Amended Petition, and Appellant agreed that Respondent's motion to dismiss previously filed could be deemed a response to the Amended Petition. At the same time, counsel for Respondent for the first time indicated that they would ask to have their motion to dismiss brought on immediately. By order of the Court, the entire matter was set over until November 30, 1978, the next day.

Also on November 29, 1978, in hearing on the same calendar, a Motion for Stay was heard and granted by Judge Sawaya in a similar capital case, Dunsdon v. Morris, No. 78-7012. In that case an evidentiary hearing was asked for and scheduled on one of the exact issues raised by Appellant's Petition: the pattern of arbitrariness and discrimination in death sentencing under the present Utah law. No motion to dismiss was made in that case by Respondent; instead, the parties there agreed to a hearing on the question and set a discovery schedule pending that hearing.

On November 30, 1978, the parties in this case again appeared before Judge Sawaya for a hearing on the motions. At that hearing Respondent began by arguing that the Petition should be dismissed because it did not raise "a single significant fact or case which was not known or should have been known . . . on October the 2nd, 1978 when

the United States Supreme Court denied the Petition for Cert in this case." Trans. 11/30/78 at 4. Respondent urged that unless Appellant's counsel could "point out what significant facts and what significant law has occurred from the time that the Amended Appellant's Briefs were filed in the Utah Supreme Court" the Petition should be summarily dismissed without a hearing on its merits. Id. at 4-5. In response, counsel for Appellant sought to point out to the Court that "there are significant new developments of fact or law which have occurred since the taking of the appeal in this case" which required a hearing. Id. at 6. Counsel cited four United States Supreme Court decisions, and two cases pending before the Court, which significantly affected the issues raised by these Petitions and which had never been considered by the Utah Courts. Id. at 6-8. Appellant's counsel further pointed out to the Court certain factual matters which could not have been presented and raised during his trial and direct appeal: the actual prejudicial impact on the jurors of publicity surrounding his case and communications to the jurors during trial; and the pattern of death sentencing that had emerged since William Andrews' trial which showed his sentence to have been imposed arbitrarily and discriminatorily. Id. at 9-12. Counsel concluded that, because of these new developments of law and fact which

could not have been injected into the direct appeal process, the issues raised by this Petition could not properly be deemed determined by dispositions in the direct appeal process. Ibid. Counsel specifically pointed out that the direct appeal process was limited to its own record (Id. at 27), and alleged that at an evidentiary they could show discrimination in the application of the Utah death penalty law which could not have been established at any earlier time (Id. at 17).

After hearing this argument, and without taking evidence or bringing the trial record before him, Judge Sawaya dismissed the Petition and denied the stay of execution. See Order of November 30, 1978. Three days later he entered findings and conclusions on that order, holding that "no developments of fact or law material to the determination of the legality or constitutionality of the conviction and sentence of the Petitioner herein have occurred since the filing of Petitioner's direct appeal to the Utah Supreme Court," that "[a]ll the issues regarding the constitutionality of the processes for death sentencing under Utah law . . . and the affect of any alleged prejudicial publicity or influences on Petitioner's trial" were "raised in his direct appeal" "or could have been raised," and that"Petitioner's claim that Utah's death penalty law has been applied arbitrarily and discriminatorily fails to state a claim on which relief could be granted or on which

a hearing need be held . . . ." Findings and Conclusions at 1. From those rulings Appellant appealed to this Court, and on December 4, 1978, was granted a stay of execution pending this appeal.

ARGUMENT

POINT I

THE CONSTITUTION AND THE RULES OF THIS COURT REQUIRE THAT POST CONVICTION RELIEF BE AVAILABLE TO PERSONS CONFINED UNDER SENTENCES IMPOSED IN VIOLATION OF THE CONSITIUTION.

In Case v. Nebraska, 381 U.S. 336 (1965), the Supreme Court suggested, but did not decide, that "the Fourteenth Amendment requires that the States afford State prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." 381 U.S. at 337. Concurring Justices of the Court noted that its previous decisions "articulated the principle that the States must afford prisoners some 'clearly defined method by which they may raise claims of denial of federal rights.'" Ibid. (concurring opinion of Justice Clark), quoting Young v. Ragen, 337 U.S. 235, 239 (1949). They pointed out the

> desirable attributes of a State post-conviction procedure should reduce the necessity for exercise of federal habeas corpus jurisdiction. The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of Fay v. Noia, (372 U.S. 391 (1963) . . . it should eschew rigid and technical doctrines of forfeiture, waiver or default. . . it should provide for full fact hearings to resolve disputed factual issues, and for compilation of the record to allow federal courts to determine the sufficiency of those hearings . . . it should provide for decisions supported by opinions or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts.

Case v. Nebraska, supra at 381 U.S. 346-347 (concurring opinion of Justice Brennan) (citations and footnotes omitted. The Justices emphasized that the availability of such procedures "will stop the rising conflict presently being generated between federal and state courts." Id. at 381 U.S. 340 (Justice Clark), 344-346 (Justice Brennan).

In 1969 this Court adopted Rule 65B(i) which provides, in part, that

> Any person imprisoned in the penitentiary or county jail under a committment of any court whether such imprisonment be under an original committment or under a committment for violation of probation or parole, who asserts that in any proceedings which resulted in his committment there was s substantial denial of his rights under the Constitution of the United States or of the State of Utah, or both, may institute a proceeding under this rule.

This rule on its face creates the kind of post conviction relief in the state courts the Supreme Court said was desireable in Case. It places no conditions on the right to bring the action it creates, except to require that "All claims of the denial of any of the complainant's constitutional rights shall be raised in the post conviction proceeding brought under this rule. . ." URCP 65B(i) (4). It permits the petitioned court to dismiss a complaint challenging the constitutionality of a committment which has "already been adjudged in a prior habeas corpus or other similar proceeding;" but makes no provision for dismissal on any other grounds not involving the merits of a valid

pleaded complaint. URCP 65B(i) (2). In short, the Rule entitles a person confined in aleged violation of the constitution to challenge his confinement through a single comprehensive petition raising his claimed right to be free.

This does not mean that a prisoner may relitigate through post conviction proceedings the self same issues decided against him in his direct appeal, or that criminal defendants may bypass issues in appealing their convictions and hold them in reserve for post conviction proceedings. In criminal cases as in all matters,

> The rule of law is wise in that it gives finality to judgments and also conserves the time of courts, in that courts should not be required to relitigate matters which have once been fully and finally determined.

Richardson v. Hodson, 26 Utah 2d 113, 485 P.2d 1044, 1046 (1971). And litigants in criminal cases as in all others, may intentionally waive and abandon a claim of constitutional right, and be barred from raising it again.

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that could fairly be described as the deliberate by-passing of state procedures,

he may be held to have waived his rights and precluded from raising them in collateral attacks. Fay v. Noia, 372 U.S. 391, 439, (1963). But absent such a prior adjudication or deliberate waiver, neither the rules governing post conviction

relief not the principle of collateral estoppel[1] governing serial litigations preclude a Utah prisoner from applying for relief from alleged unconstitutional confinement.

Dicta in this Court's decisions since the passage of Rule 65B(i) have properly emphasized "the error of attempting to use such a writ as a substitute for the prescribed appeal procedure." Rammell v. Smith, 560 P.2d 1108, 1109 (1977). But the Court has not curtailed the availability of the writ "where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term due process of law." Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121, 122-123 (1967). It has noted its awareness of the expanding concepts of due process and the availability of habeas corpus. (See id. at 123 n.5) And though it has continued to caution against the use of habeas corpus proceedings to raise issues that could be raised on direct appeal, both this court and the lower courts it has affirmed have nonetheless reached the merits even of issues that clearly could have been raised on appeal where they are of constitutional dimension. See, eg., Rammell v. Smith, supra;

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[1]The rule of collateral estoppel governs "situations like this wherein issues which are actually decided against a party in prior action may be relied upon by an opponent in a later case as having been judicially established." Richardson v. Hodson, supra at 485 P.2d 1046. "The estoppel applies only to issues actually litigated and not to those which could have been determined." Ibid.

Horne v. Turner, 29 Utah 2d 175, 506 P.2d 1268 (1973); Zumbrunnen v. Turner, 27 Utah 2d 428, 497 P.2d 34, 35 (1972). It has held that where "there has been such unfairness or failure to accord due process that it would be wholly unconscionable not to re-examine the conviction" habeas corpus will lie. Webster v. Jones, 587 P.2d 528, 530 (Utah 1978).

Appellant submits that where, as here, a man is being sent to die and claiming he was not given a fair trial and was denied his constitutional rights, it would be unconscionable not to examine the merit of his claims.

Moreover, it would be unjustifiable. To hold, as the District Courts did in this case, that the possibility that an issue could have previously been raised on appeal absolutely and finally bars its assertion on habeas corpus, would be to ignore the plain provisions of URCP 65B(i), to leave prisoners confined in violation of constitutional rights they have not waived without a state remedy, and to force them into federal court without even a hearing in a court in Utah. No purpose could possibly be served by such an absolute and inflexible bar. The state's interest in finality of judgments is fully satisfied by this Court's rule permitting and requiring constitutional challenges to confinement to be raised in a single post conviction petition. Rule 65B(i) (4). Judicial efficiency is protected by the rule of collateral estoppel, which forecloses the raising of issues previously adjudicated in a case involving a party raising them. See Richardson v. Hodson, supra. But

expansion of that rule to declare waived and bar from Utah courts any constitutional claim which conceivably could have been raised at the time of the appeal--whether or not the defendant there made any knowing waiver, whether or not the law or the facts on which the claim is based was known or established at the time--simply erases the remedy Rule 65B(i) provides, and forces prisoners to challenge their confinement, and the State to defend it, in federal court.

The District Court here erred in failing to determine which of Appellant's constitutional claims were new, whether any of them had been waived, and which of them were based on new facts or law not available at the time of his direct appeal. Its summary dismissal of this petition, forcing Appellant out of the Utah courts without a hearing on the facts or law he asserts, should be reversed.

POINT II

A COURT CANNOT PROPERLY DETEMINE THAT AN ISSUE IS FORECLOSED BY A PRIOR DECISION WITHOUT FINDING FACTS AND HAVING THE ENTIRE RECORD OF PRIOR PROCEEDINGS BEFORE IT.

Rule 65B(i)(7) requires that prior to a hearing on a post conviction relief petition, "the State or County shall obtain such transcript of proceedings or court records as may be relevant or material to the case." In order to make a determination that the raising of an issue is foreclosed by the doctrine of res judicata, a trial court must have the entire record of the prior proceeding before it. See Parris v. Layton City Corp.

542 P.2d 1086 (Utah 1975). Such reference to the prior record is necessary because a determination that a matter is foreclosed by a prior decision requires a determination of fact; it cannot be made from the face of the pleadings before the court. For that reason, a motion claiming that one lawsuit should be dismissed because it is barred by the decision in another is not a motion under URCP 12(b) but a matter for summary judgment under Rule 56 since it requires examination of materials and facts beyond the pleadings. See Vance v. Heath, 42 Utah 148, 129 P. 365 (1912); Escalante Co. v. Kent, 79 Utah 26, 7 P.2d 276 (1932). Those matters must include the entire record of the prior proceeding, so that it can be determined exactly what was in fact decided there. Parrish v. Layton City Corp., supra.

Habeas corpus proceedings are civil, and are governed by the rules of civil procedure in Utah. URCP 65B(i)(6). It is one of the most basic rules of civil practice that, when a motion to dismiss raises "matters outside the pleading . . . the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." URCP 12(b)(6). It is error to deny the parties the opportunity to fully present evidence and contest the factual allegations on which the motion is based.

> It is error to consider a motion to dismiss as a motion for summary judgment without giving the adverse party an opporutnity to present pertinent material.

Strand v. Associated Students of Univ. of Utah, 561 P.2d 191, 193 (Utah 1977). It is error for a trial court to convert a motion to dismiss into a motion for summary judgment or to

require the plaintiff to state "how he will establish his claim . . ." Hill v. Grand Central Inc. 25 Utah 2d 121, 477 P.2d 150, 151 (1970); see Harvey v. Sanders, 534 P.2d 905 (Utah 1975); Beacons Bar V Ranch v. Utah Farm Productions, 587 P.2d 151 (Utah 1978). And it is clear error for a court to make a factual determination concluding a case without having the pertinent evidentiary materials before it.

In this case the District Court made all these errors. It rejected that Appellant's specific allegation that the death penalty was being imposed on him for reasons not permissible under the Constitution (Trans. 11/30/78 at 28) and that the death penalty was being administered "arbitrarily and discriminatorily against the poor and outcast whose alleged victims are white" (Petition at 8), without conducting any evidentiary inquiry into whether those allegations were true. It held that Appellant could and should have proven at his trial or on his direct appeal that the jury in his case was actually affected and prejudiced by improper outside influences, without examining the record to see whether, as he claimed, it was impossible for him to establish those facts at trial. See Trans. 11/30/78 at 9. It accepted representations by counsel regarding the significance of the verdicts at trial (see Id. at 22) without looking into the whole record to determine whether, in fact, those verdicts had that significance. And it ruled that substantial claims of

constitutional rights violations were not available to Appellant, without determining from any record whether he had personally waived them or whether his counsel had in any previous proceeding been afforded the opportunity to assert them.

The kind of dismissal that the District Court entered in this case is specifically reserved by the rules of civil procedure for pleadings which on their face fail to state a cause of action. A ruling that necessarily goes beyond the face of the pleadings cannot be made in the manner in which the District Court acted.

Parties bringing a lawsuit proper on its face are entitled to an opportunity to present these necessary materials and arguments to the court before their case is dismissed. The District Court afforded Appellant no opportunity to present his evidence and arguments. Accordingly, the determinations made by the District Court were factually and legally wrong, both in the manner it reached them and in the result reached.

POINT III

NEW DEVELOPMENTS OF CONSTITUTIONAL LAW WHICH ARE RETROACTIVE TO PRIOR CASES CAN PROPERLY PROVIDE THE BASIS FOR HABEAS CORPUS RELIEF.

The position of the Respondent State of Utah below was that new constitutional claims may not be raised on habeas corpus unless "new issues of law or fact arise that were not known at the time of appeal." Memorandum in Support of Motion to Dismiss Amended Petition at 9. There was no dispute about the standard under existing Utah law. Trans. 11/30/78 at 6. One of the essential functions of the modern Writ is to raise newly emerged constitutional issues after the opportunity to raise them on appeal has passed. See Fay v. Noia, 372 U.S. 391 (1963). A mere failure to raise a point established by constitutional case law in an appeal cannot foreclose later reliance on that case law, unless the failure constitutes a waiver or the law is new and non-retroactive.

"[W]aiver affecting federal rights is a federal question," Fay v. Noia, supra at 372 U.S. 439, and under that law a constitutional waiver must be"an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). A right not yet established by controlling case law can hardly be deemed "known" or "abandoned intentionally" by a lawyer's failure to foresee it. The course of

constitutional decision making seldom runs smooth, and its forks and turns are seldom easy to anticipate. Especially in the death penalty area "[t]he signals from [the Supreme] Court have not . . . always been easy to decipher," and the Court's decisions have "engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973, 986-988, 98 S.Ct. 2954 (1978). Counsel can hardly fairly be deemed to have "intentionally" waived constitutional issues in this area by not mentioning them before they are recognized by the Courts. Moreover, even if counsel could be held so accountable, a defendant himself cannot--and a federal constitutional waiver must be a personal one. "A choice made by counsel not participated in by the Petitioner does not automatically bar relief" in later proceedings. Fay v. Noia, supra at 372 U.S. 439.

A constitutional claim not waived should be available in any case to which it applies, unless that case arose before the principle was announced and the principle is declared non-retroactive. The District Court's decision in this case in effect held that the new constitutional case law on which Appellant was relying was not retroactive to cases past the stage of direct appeal. But retroactivity of new constitutional decisions is itself

a matter of federal law to be determined by considering the nature of the right involved, policies affected by its enforcement, and the stage of the proceedings at which it is invoked. See Hankerson v. North Carolina, 432 U.S. 233, 241-243 (1977). Where, as here, the constitutional doctrine announced touches the "truth-finding function" rather than some evidentiary rule aimed at influencing actions in future cases, it presumably is retroactive. Ibid. The District Court here gave no reason why the decisions Appellant cited should not be considered retroactive to his case, and indeed apparently did not even examine them. Its summary rejection of new law that could not have been injected into this case at any earlier stage was error.

POINT IV

APPELLANT'S CLAIMS THAT THE UTAH DEATH PENALTY LAWS ARE UNCONSTITUTIONAL ON THEIR FACE WERE BASED ON NEW CONSTITUTIONAL DECISIONS WHICH ARE APPLICABLE HERE.

In Gregg v. Georgia, 428 U.S. 153 (1976) and its companion cases, the Supreme Court upheld three death penalty statutes, struck down two, and emphasized that the constitutionality of "each distinct system must be examined on an individual basis." 428 U.S. at 195. In State v. Pierre,572 P.2d 1338, 1356 (Utah 1977) this Court "acknowledge[d] that Utah's system, applicable to defendant, differs in some respects from those systems in

Georgia, Florida and Texas . . . ." In Gilmore v. Utah, ___ U.S. ___, 97 S.Ct. 436 (1976) though the Court did not reach the substantive issue, three Supreme Court Justices expressed "obvious, serious doubts about the validity of the [Utah] state statute" and a fourth deemed them "not insubstantial". 97 S.Ct. at 439 (dissenting opinions of Justices White, Brennan and Marshall), 440 (dissenting opinion of Justice Blackmun). In the two years after Gilmore and after this Court heard argument on these issues, the Supreme Court issued several further capital punishments decisions which underscored the reasons for those doubts.

In Gregg v. Georgia, and its companion cases, the Supreme Court upheld three statutes that provided elaborate procedures to guard against the arbitrariness and discrimination in death sentencing that Furman v. Georgia, 408 U.S. 238 (1972) had condemned. All three of the statutory systems which Gregg cases unheld provided for bifurcated trials on guilt and sentence. In the sentencing proceeding under each statute, the State was required to specifically allege one or more "aggravating" facts which the law specifically delineated, and which the State contended justified imposition of the death penalty. Under each system the sentencing judge or jury had to find one or more of these facts established--in addition to the facts

which it had found in determining guilt--and to specify the particular facts it found true in rendering a death verdict. "Aggravating" factors other than those listed by statute could not support a sentence of death. Appellate review of specific "aggravating" factors found was provided to insure that the sentence was both legal and in proportion to the crime. See Gregg v. Georgia, supra at 428 U.S. 196-212; Jurek v. Texas, 428 U.S. 262, 269-274 (1976); Proffitt v. Florida, 428 U.S. 242, 249-253 (1976).

Supreme Court decisions since Gregg have highlighted the importance of each of these features of the statutes to their constitutional validity. In (Harry) Roberts v. Louisiana, 431 U.S. 633 (1977), a clear majority of the Court held squarely that mere narrowing of the definition of a capital crime is not enough to satisfy Furman where adequate safeguards against jury arbitrariness are not provided as well. In Gardner v. Florida, 430 U.S. 349 (1977) the Court re-emphasized the critical importance of procedural safeguards at the sentencing stage. Gardner held that, because "death is a different kind of punishment than any other which may be imposed in this country," a death sentencing proceeding must satisfy the highest "standards of procedural fairness" so that "any decision to impose the death sentence [will] be, and appear to be,

based on reason rather than caprice and emotion." 430 U.S. at 358 ; see Id. at 430 U.S. 363 (concurring opinion of Justice White). Specifically, Gardner invalidated the use of secret information in capital sentencing which permitted sentences to be imposed without the defendant having notice of the specific allegations and the opportunity to contest them, and without the sentencing authority making specific findings to "disclose to the reviewing court the considerations which motivated the death sentence . . . ." Id. at 430 U.S. 361. Gardner stands for the proposition that a system that permits the death sentence to be imposed without giving open and specific and consistent reasons cannot be sustained. That holding was adhered to even more recently in Presnell v. Georgia, ___ U.S. ___, 58 L.Ed.2d 207 (1978) where the Court overturned a Georgia death sentence affirmed by the Georgia Supreme Court on aggravating factors other than those specified in the jury verdict, because such inconsistencies violated the kind of "fundamental principles of procedural fairness . . . at the penalty phase of a trial in a capital case" announced in Gardner. 58 L.Ed.2d at 211.

Appellant's trial, and the Utah procedures under which it was conducted, did not meet the standards set down by these cases. Though the hearing was bifurcated on trial and sentencing, no factual findings were required at the

sentencing phase; as in (Harry) Roberts and Woodson v. North Carolina, 428 U.S. 280 (1976) the jury, having convicted, was free to impose a death or life sentence for reasons wholly outside those recognized by law. Cf. Woodson v. North Carolina, supra at 428 U.S. 302-303 . Like the Petitioner in Gardner v. Florida, supra, Appellant was given no notice by statute or information of the specific grounds on which a death sentence would be sought or could be based, and no such ground was ever specified by the sentencing authority. It is thus fully possible that, like the Georgia Supreme Court in Presnell, this Court's affirmance of Appellant's sentence on direct appeal (see State v. Andrews, supra at 574 P.2d 711) was based on reasons different from those which the jury found determinative in making its decision. Not even the most basic due process notions, let alone the extraordinary standards established by Gardner, are met by a system which places no limit on the issues to be considered, requires no pleading or proof of them beyond a reasonable doubt, and makes no open finding of reasons for imposition of the most extreme penalty.

These, briefly, were Appellant's claims against the constitutionality of Utah death sentencing procedures in his Petition below. See Amended Petition at 4-8. In

addition, the Petition contended that the particular sentence imposed on William Andrews, "who has never been alleged nor proven or found by any court or jury to have personally taken life or intended to take life, is constitutionally cruel and disproportionate to the crime . . . ." Id. at 9. This claim was drawn from another recent Supreme Court decision, that in Lockett v. Ohio, supra. In Lockett, a concurring opinion necessary to the decision of the majority held that "[b]ecause it has been extremely rare that the death penalty has been imposed upon those who were not found to have intended the death of the victim" or "who did not personally commit the murder,"

> it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.

57 L. Ed. 2d at 1002. Similarly, Appellant's Petition alleged that the method of execution used in this State "constitutes the purposeless infliction of pain through means inconsistent with the evolving standards of decency in the United States." Amended Petition at 9. This claim was based on the Eighth Amendment rules of Coker v. Georgia, 433 U.S. 584 (1977), which held that

> the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" . . . . [A] punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless imposition of pain and suffering, or (2) is grossly out of proportion to the severity of the crime.

433 U.S. 592. Coker struck down the death penalty for rape in part because that penalty had been rejected as too extreme by all states but Georgia, and had extremely rarely been carried out in modern times anywhere. 433 U.S. 596-597. In Lockett, Justice White followed Coker's principles and based his decision that death must be reserved for intentional killings partly on the fact that the death penalty applied to unintended crimes "fails to significantly contribute to acceptable, or, indeed, any perceptible goals of punishment." 57 L. Ed. 2d at 1002-1003. Had Appellant been given the hearing he requested on his claim against the method of execution here (see Amended Petition at 9-10), he would have sought to prove that execution by firing squad has been rejected by all jurisdictions save Utah, and constitutes the "purposeless imposition of pain and suffering" which serves no penal purpose but to satisfy certain doctrines of the Mormon Church. Such a showing would clearly have brought his claim within the Eighth Amendment rules of Coker.

These new issues of law significantly affect the constitutionality of the sentence imposed on Appellant William Andrews. They should be considered by the Utah courts before the validity of that sentence is finally passed upon. The District Court should have considered them before holding that the sentence had been conclusively upheld. This Court should remand this case so that the courts can consider them now.

POINT V

A CLAIM THAT A PERSON HAS BEEN SENTENCED TO DEATH AS A RESULT OF RACIAL DISCRIMINATION CANNOT BE DISMISSED AS A MATTER OF LAW WITHOUT AN INQUIRY TO DETERMINE IF THAT CLAIM IS TRUE.

The one issue raised by Appellant's Petition on which the District Court reached the merits was the contention that the death penalty is being imposed in Utah and in the United States "rarely and arbitrarily and discriminatorily against the poor and outcast whose alleged victims are white," and almost exclusively in cases where the defendant "is non-white, male, poor, and a stranger in the community in which he was tried." Amended Petition at 8-9. The District Court ruled that this portion of the Petition "fails to state a claim on which relief could be granted or on which a hearing need be held . . . ."[2] Findings and Conclusions at 1. The Court thus held, in effect, that Appellant was entitled to no relief whether or not his life was being taken by the State, as he alleged, arbitrarily and as the result of racial discrimination.

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[2] Judge Sawaya added in his written findings that "Petitioner could & should have raised such issue on direct appeal" (Ibid.) but it is clear that this alternative was not the basis of his holding. It was undisputed that the two petitioners before the Court were the first persons sentenced to death under the Utah law, and that they had had no prior opportunity to offer evidence of discrimination in the appeal process. Trans. 11/30/78 at 11, 29-30. Judge Sawaya recognized this and acknowledged that he "took the position that even though it was not an issue that was or could have been raised at the time of direct appeal, that it was not an issue which had any merit." Trans. of Hearing 12/15/78 at 6, Codianna v. Morris, Utah Sup. Ct.No. 16187.

The District Court made its rulings despite the fact that the Petitioners before him clearly argued that the death sentenced here were imposed "because of race and because of arbitrary and capricious powers exercised by prosecutors," and alluded to evidence they could offer to support that claim. Trans. 11/30/78 at 17. It heard neither this evidence nor legal argument from the Petitioners in support. Instead, it apparently relied on the Respondent's arguments that there could be no constitutional challenge to "prosecutorial discretion in charging a capital felony" (Memo. Supporting Motion to Dismiss at 6), though Petitioners made it clear that

> We are not limiting our allegations to prosecutorial discretion but we are looking, as the Court did in Furman, at the whole system. People that go into it on capital charges or potentially capital charges and the people that come out with death sentences, we are saying that there is no rhyme or reason or, if there is any rhyme or reason, they are reasons that are not permissible under the Constitution of the United States.

Trans. 11/30/78 at 28. Clearly, those allegations stated a claim on which relief could and, if they were proven, would have to be granted.

It is long since settled that the Constitution forbids the discriminatory enforcement of a facially valid statute.

> Though the law itself may be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal

> hand, so as practically to make unjust an illegal discriminations between persons in similar circumstances material to their rights, denial of equal justice is still within the prohibition of the constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886). For the hundred years since that was decided it has been accepted that a person penalized as part of a pattern of discriminatory law enforcement was entitled to judicial relief. See, e.g., Norris v. Alabama, 294 U.S. 587 (1935); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Allee v. Madrano. 416 U.S. 802 (1974).

In Furman v. Georgia, 408 U.S. 236 (1972), the Supreme Court held that the imposition and carrying out of the death penalty under sentencing systems then in force violated the Eighth and Fourteenth Amendments--because under those systems "the penalty was being imposed discriminatorily, wantonly and freakishly, and so infrequently that any given death sentence was cruel and unusual." Gregg v. Georgia, 428 U.S. 153, 220-221 (1976). The Furman majority was made up of five separate opinions; but at the core of each of them was this principle:

> The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly and . . . freakishly imposed.

Id. 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart;

the Eighth and Fourteenth Amendments are violated if

> the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from any cases in which it is not.

Id. at 408 U.S. 313 (concurring opinion of Mr. Justice White). Furman therefore stands for the proposition that the arbitrary and capricious application of the death penalty violates the Eighth and Fourteenth Amendments--and its prohibition extends to any form of "arbitrary and capricious exercise" of "the power to determine which first-degree murderers shall live and which shall die." Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion). "The basic concern of Furman centered on those defendants who are being condemned to death capriciously and arbitrarily." Id. at 428 U.S. 303 (concurring opinions of Justices Stewart, Powell and Stevens). To explore that concern the Court there looked to the actual pattern of imposition of the sentence of death under the statutes it was examining. See Furman v. Georgia, supra at 408 U.S. 256-257 (concurring opinion of Justice Brennan), 309-310 (concurring opinion of Justice Stewart), 311-314 (concurring opinion of Justice White).

> The generalities of the law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do or may lead to quite different conclusions.

Id. at 408 U.S. 242 (concurring opinion of Justice Douglas).

In Gregg v. Georgia, supra, and several companion cases, the Supreme Court affirmed the validity of three of five capital sentencing statutes before it "on their face . . . ." Profitt v. Florida, 428 U.S. 242, 251 (1976). (plurality opinion). To the extent the Court examined the actual administration of the death penalty under those statutes, it found nothing in the records before it to support any claim or arbitrariness and discrimination in fact. See Gregg v. Georgia, supra at 428 U.S. 222, 224, 225; Jurek v. Texas, 428 U.S. 262, 279 (1976). The Court explicitly stated it could not consider claims of arbitrariness "unsupported by any facts," or assume other than proper actions or motives "absent facts to the contrary . . . ." Gregg v. Georgia, supra at 428 U.S. 225 (plurality opinion). Furman's essential dictate that death sentences could not constitutionally be dispensed in an arbitrary, rare and uneven fashion under any kind of sentencing system thus clearly survived Gregg. See Woodson v. North Carolina, supra at 428 U.S. 302-303. Appellant's claim here was that this dictate had been violated under this Utah law and in his case.

A motion to dismiss for failure to state a claim cannot be granted unless it appears to a certainty that the claimant would not be entitled to relief under any state of facts that could be proven in support of his claim. Liquor Control Comm. v. Athas, 121 Utah 457, 243 P.2d 441, 443 (1952). Clearly, under Furman, and under the most basic law of equal protection, proof of the fact that a person's life is being

taken as part of a pattern of discriminatory deprivation of life on the basis of race would entitle that person to relief. Appellant has alleged and does allege that his life is being taken in this manner--that because he is black and his victims were white, because he is an outsider and his victims were Utah residents, because he was poor and his victims were prominent he has been condemned to die where others convicted of crimes of similar gravity but not sharing his disadvantages were not. See Trans. 11/30/78 at 17-18; Amended Petition at 8-9. Such allegations assert the most fundamental kind of equal protection violation. Under no constitutional theory can they be dismissed as a matter of law.

CONCLUSION

For the above stated reasons the District Court's Order dismissing the Petition in this case and denying a stay of execution, should be reversed and the case should be remanded for the full briefing and evidentiary hearing to which Petitioner was entitled.

Respectfully submitted,

JOHN T. CAINE

TIMOTHY K. FORD

CERTIFICATE OF DELIVERY

I hereby certify that I personally served a copy of the foregoing Brief of Appellant on the Office of the Attorney General for the State of Utah, Attorney for Respondent Lawrence Morris, State Capitol, Salt Lake City, Utah, this 20th day of February, 1979.